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Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

THE BOARD OF COUNTY
COMMISSIONERS OF THE
COUNTY OF LAKE AND
STATE OF COLORADO,

Petitioner,

vs.

HARRY H. DUDLEY,

Respondent.

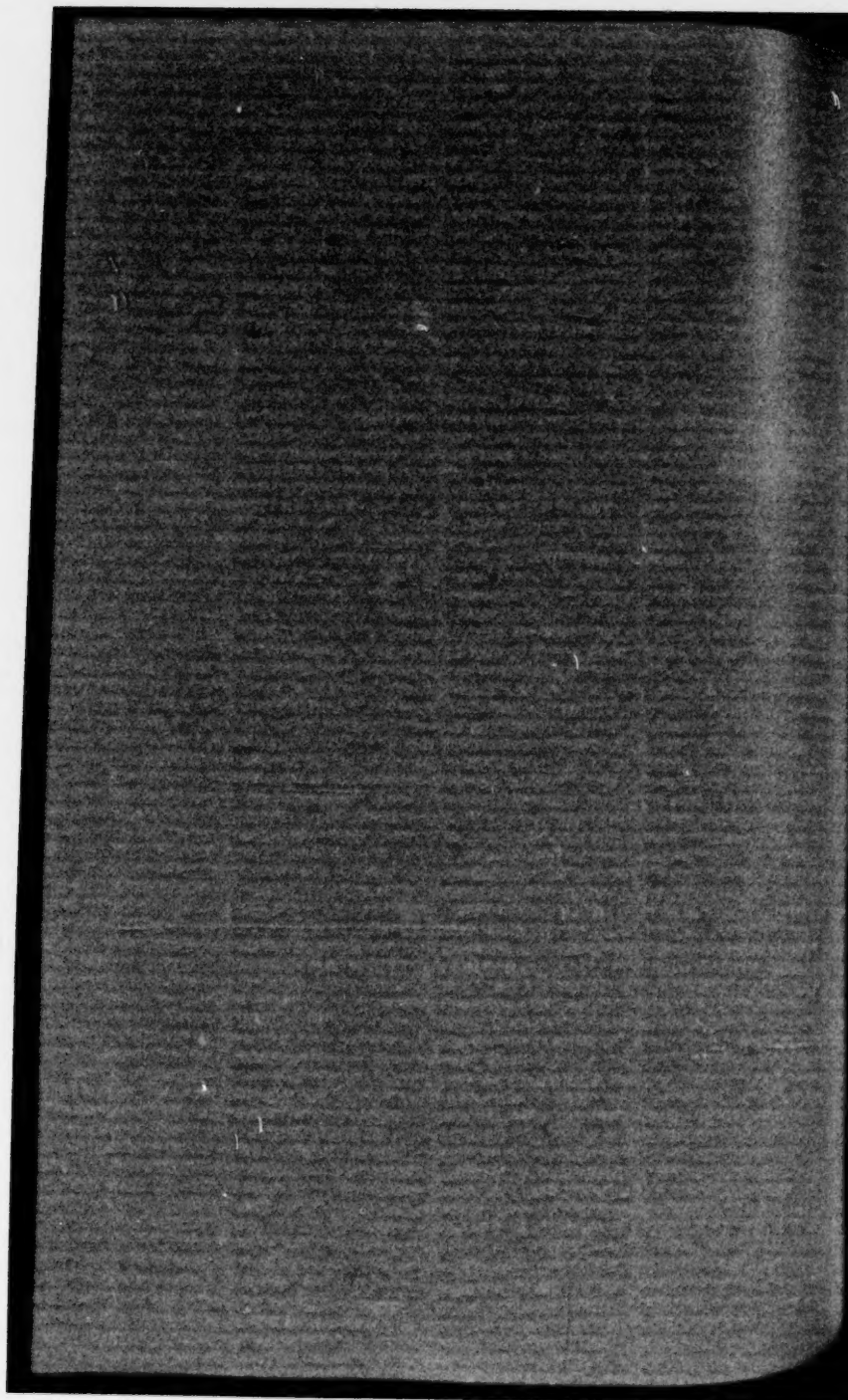
IN OPPOSITION TO THE GRANT-
ING OF THE WRIT OF CERTIORARI.

DANIEL E. PARKS,

H. B. JOHNSON,

EDMUND F. RICHARDSON,

Attorneys for Respondent.



No.

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VS.

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BRIEF IN OPPOSITION TO THE GRANT- ING OF THE WRIT OF CERTIORARI.

It will be well before entering upon a discussion of the merits of the decision which is sought to be set aside by the granting of the writ of *certiorari* herein, to consider the functions of that writ in connection with the decision complained of.

This application is made under one of the clauses of section 6 of the act of March 3, 1891, entitled "An Act to Establish Circuit Courts of Appeal," etc. The language of the clause referred to is as follows:

"And excepting, also, that in any such case as is here-
inbefore made final in the Circuit Court of Appeals it shall
be competent for the Supreme Court to require, by *certio-
rari* or otherwise, any such case to be certified to the Su-
preme Court for its review and determination, with the
same power and authority in the case as if it had been car-
ried by appeal or writ of error to the Supreme Court."

The case at bar is one which is made final in the ap-
pellate jurisdiction of the Circuit Court of Appeals subject
to this excepting clause. The language of the clause is
very broad leaving the question of competency, it is sup-
posed, for the Supreme Court to determine. So far as we
are advised at this distance the rule of practice has not
been well settled by the court as to what the court will
consider competency in determining whether or not the
jurisdiction of the Supreme Court shall attach. It is but
fair to presume that the court will not be swift to take jur-
isdiction under this clause, and if such be true, it would
seem proper to call the attention of the court to the fact
that the decision sought to be reviewed is not one which is
final in its character. The decision, as reported in the 80
Fed. at page 672, orders that "the judgment of the Circuit
Court is accordingly reversed, and the case is remanded
for a new trial." The force and effect of this decision is
wholly interlocutory. It may well be that upon that new
trial a decision will be rendered upon which the Circuit
Court and the Circuit Court of Appeals can agree. When
such an agreement is reached between them it will be suf-

ficiently soon for this court to look it to the record so as to see whether any principle of law heretofore announced by its decisions has been violated. Had the decision of the Circuit Court of Appeals affirmed the judgment of the court below, it might then be said with some degree of propriety that the authority given by the clause in question should be exercised and a final determination of the matter had in this court. We recognize the fact that a decision here reversing the Court of Appeals might become final as to this case, but if after looking into this record it should be determined, either in whole or in part, that the decision of the Court of Appeals should be sustained, the case would necessarily be sent to the Circuit Court for a new trial. Under such a state of facts the time would be but short before this court would again be troubled with an application for a writ of *certiorari*. We therefore suggest to the court that it deny this application and permit the courts below to agree in a decision on the same side and for the same parties. When that is done the loser may then invoke the aid of this court to grant this writ, and make a single and final determination of the entire matter.

Rice vs. Sanger, 144 U. S. 197.

Chicago, etc. Railway Co. vs. Osborne, 146 U. S. 354.

American Construction Co. vs. Jacksonville T. & K. W. Co. 148 U. S. 372, and cases there cited.

Forsyth vs. Hammond, 166 U. S. 506.

With these preliminary observations we pass to a discussion of the petition and brief in support thereof, filed by the Board of County Commissioners of Lake county.

It is broadly asserted that the matters complained of, upon which the writ is expected to go, are four in number.

First: Whether the issue of bonds by the county of Lake here sued upon is void or valid?

Second: Whether this plaintiff is authorized to institute and maintain this action?

Third: Whether the decision sought to be set aside is in conflict with the decisions of this court; and,

Fourth: Whether or not the bonds here in suit are obnoxious to the inhibition of section 6 of article 11 of the constitution of the state of Colorado.

These four propositions, argued at considerable length in the brief, can readily be determined under two heads.

First: Is the plaintiff entitled to maintain this suit.

Second: Under the rules of law, as enshrined in the decisions of the Federal Courts, are these bonds, under the record as it now stands, valid or void.

I.

Is the plaintiff entitled to maintain this suit.

If the proposition in question rests upon the *bona fides* of the plaintiff, as would seem to be the case from the written argument, then it is a complete answer to the argument of counsel to say, that at best such *bona fides* was in

issue and was clearly, therefore, under the testimony both of Mr. Wright and Mr. Rollins, a matter for the determination of the jury, and not for the arbitrary action of the court. If, on the other hand, it be true that Mr. Roberts, the original payee of the bonds, gave for such bonds 95 per cent, as stands undisputed in the record (folio 258) as made by the petitioner, and if it be farther true, as also appears from the record, that Mr. Rollins bought these bonds of Mr. Roberts (folio 70) and gave 92½ per cent for them in cash, without any knowledge that such bonds were tainted with invalidity, then the first position taken by the Court of Appeals is unanswerable, and the authorities cited fully support the doctrine there announced.

It will be remembered that these bonds are negotiable instruments, passing from hand to hand by delivery. The statute then, and until the year 1897, in force in Colorado provides that any bonds "made payable to any person or persons shall be assignable by endorsement thereon under the hand of such person and of his assignee, in the same manner as bills of exchange are, so as absolutely to transfer and vest said property in the purchaser and every assignee successively." And the Supreme Court of Colorado, under the section of the code which provides that every action shall be prosecuted in the name of the real party in interest, have repeatedly decided that the provision of that section is but synonymous with the person who holds the legal title.

First National Bank vs. Hummel, 14 Colo. 275.

Gomer vs. Stockdale, 5 Colo. App. 489.

Even before the code was enacted, it was held that in suing on a promissory note it was unnecessary to allege or

prove the assignment of the note to the person in whose name the suit is brought.

Cody vs. Butterfield, 1 Colo. 385.

Patton vs. Coen *et al.* 3 Colo. 269.

And these cases were followed in

Board vs. Sloan, 5 Colo. 39.

It is enough to say on this branch of the case that E. H. Rollins & Sons were acting as the brokers or agents and custodians for the bonds and coupons in question belonging to the plaintiff. And since the Act of Congress of March 3, 1875, as amended by section 1 of the Act of 1887, has been in force, it is difficult to determine what difference it makes, where the paper sued on is made by a corporation, whether the grantor had any right to maintain a suit in the federal court or not. The jurisdiction is governed under that section by the character of the paper sued on; and where title to such paper passed by delivery, as in this case, a complaint that a conveyance of the paper was made without consideration for the express purpose of giving the federal court jurisdiction, would be without foundation even if it were true, which no where appears.

Newgass vs. New Orleans, 33 Fed. Rep. 199.

Rollins vs. Chaffee Co. 34 Fed. Rep. 93.

Jerome vs. Commissioners, 18 Fed. 873.

Perrine vs. Town of Thompson, 17 Blatchford,
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City of Lexington vs. Butler, 14 Wallace, 283.

Commissioners vs. Bolles, 94 U. S. 104.

In the case last cited the action was upon bonds, a portion of which were owned by other persons, who simply

deposited them with the plaintiff for collection. The court upheld the right to maintain the suit, upon the ground that their predecessors in ownership were *bona fide* owners, and that the plaintiff had succeeded to their rights, and the ground of such *bona fides* was distinctly placed upon the proposition that the railroad company gave for the bonds and coupons an equal amount of stock, which the county held at the time suit was brought. If such a position was taken in that case, what may we say of Mr. Roberts who paid 95 per cent of the face value of these bonds, or of Mr. Rollins who thereafter paid Mr. Roberts 92½ per cent of the face value.

The case which is relied upon to defeat plaintiff's right to maintain this suit, on the question of *bona fides*, is that of Lytle vs. Lansing, 147 U. S. 59. A mere glance at that case is sufficient to convince the court that it does not warrant the position taken by counsel. In the masterly analysis of Mr. Justice Brown, several things appear which do not appear in this case. First, it will be seen that "the actual illegality of the paper (was) established." Next, it was held that "in such a case (it being incumbent upon the plaintiff to show that it was a *bona fide* holder) the plaintiff fulfils all the requirements of the law by showing that either he or some person through whom he derived title was a *bona fide* purchaser for value without notice." Having recognized these general principals, it was then determined: First, that the people who originally got the bonds never purchased them and never took title to them; Second, that when they transferred the bonds to Elliott, Collins & Co. that firm took them under precisely the same conditions and with the same knowledge that their grantors held them; Third, that Elliott, Collins & Co. either direct-

ly or indirectly, transferred them to one John J. Stewart, and that the record disclosed "no evidence whatever to show how Stewart became possessed of them, or that he gave value for them, or that he took them without notice of their original invalidity, and that no one knew Stewart, no one had ever seen him, and that if any sale was actually made it was made at an enormous discount." Taking all those things into consideration, it is not strange that Stewart was held in a suit by him on the coupons to be not a *bona fide* purchaser. The bonds then went to one Breckenridge, who claimed to have paid \$50,000 for them by check, which was produced by the cashier of the bank upon which it was drawn, instead of Breckenridge, under testimony which showed there was no special agreement for the purchase of the bonds, and Breckenridge knew at the time of purchase that the coupons and bonds had been declared invalid in the state courts. This man Breckenridge afterwards transferred them to the plaintiff, Mr. Lytle, for an interest in a farm, with full knowledge on Lytle's part of all of the matters and things which had gone before. It was held that such knowledge was fatal to Lytle's recovery; that he did not follow up the matters and things brought to his attention by his grantor, even if his purchase had been a *bona fide* purchase otherwise, which was a matter admitting of such grave doubt that it is plain to be seen from reading the decision that no one had believed that there was any conveyance to Mr. Lytle at all. The whole opinion of the court is based upon the proposition that the town of Lansing never got value, nor anything of value, for the bonds which it had purported to issue, and that the supposed bonds were gotten from the town by false and fraudulent representations.

But we are satisfied that we can add nothing to the language of the Court of Appeals in the first proposition of their decision upon this subject. A reading of the record left no doubt in the minds of every individual who composed that court, as it will leave no doubt in the minds of the individuals who compose this court, that there was no serious question touching the *bona fides* of the plaintiff's grantors. In any event, as we said before, it would be a question for a jury, which would necessitate a reversal of this case.

We think it is clear that the distinction between this case and the one of *Farmington vs. Pillsbury*, 114 U. S. 138, is of such a character that it requires no argument to show that the latter case forms no precedent for the government of the one at bar. There the Supreme Court of Maine had jurisdiction, and had declared all of the bonds void, and had in effect directed them to be surrendered up to be canceled, and with full knowledge of that decision, and for the express purpose of giving the Federal court jurisdiction, and prior to the act of March 3, 1888, hereinbefore referred to, a nominal plaintiff was found in Massachusetts to maintain the action for the express purpose of avoiding the decision of the Supreme Court of Maine. It further appears from the decision that the bonds there under consideration were in the nature of a donation in aid of the Androscoggin railroad company.

There has ever been a grave and substantial distinction drawn between that class of cases which have found their way to the Supreme Court, where the municipality received absolutely nothing for the bonds sought to be enforced, and where the municipality received value for the bonds issued, and later on sought to escape the payment of

its otherwise just obligations because of some constitutional or statutory inhibition in the manner or matter of issuing said bonds. We are unable to find a case where the payment of ninety-five per cent of the face value of such security has been held not to be an evidence of good faith on the part of the party purchasing the bonds, and we think counsel, with all of their ability and industry, will be unable to show one.

II.

Under the rules of law, as enshrined in the decisions of the Federal Courts, are these bonds, under the record as it now stands, valid or void?

The total issue of the bonds, some of the coupons of which are here sued upon, was an issue of \$50,000. The bonds recite upon their face the total amount of the series, the date of the election under which the bonds were issued, and a certificate that all of the provisions of the act under which the bonds were issued were fully complied with by the proper officers. A copy of sections 20, 21, 22, 23, 24 and 25 of the act of March 24, 1877, the same being the sections of the act under which the bonds were issued, was printed upon the back of each bond.

Section 6 of Article 11 of the Colorado Constitution, as it was in force at the time these bonds were issued, was as follows:

“No county shall contract any debt by loan in any form, except for the purpose of erecting necessary public

buildings, making or repairing public roads and bridges, and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county following, to-wit: Counties in which the assessed valuation of taxable property shall exceed five millions of dollars, \$1.50 on each thousand thereof; counties in which such valuation shall be less than five million dollars, \$3 on each thousand dollars thereof. And the aggregate amount of indebtedness of any county for all purposes, *exclusive of debts contracted before the adoption of this constitution*, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not exceed twice the rate upon the valuation last herein mentioned: *Provided, that this section shall not apply to counties having a valuation of less than one million of dollars.*"

It is claimed by counsel with great vehemence that the bonds in suit, owing to the fact that they recite upon their face that they are for the total sum of \$50,000, are obnoxious to this constitutional inhibition by the rule laid down in *Dixon County vs. Field*, and similar cases. It is conceded that as an actual matter of fact the bonds embraced in this issue were not and could not have been delivered by the county to the grantee named in the bonds

until sometime after the sixth day of September, 1880. It is further conceded by counsel that at that time the assessment which governed the amount of indebtedness that could be contracted by the county was the assessment of 1880, under the doctrine of the case of *Lake County vs. Standley*, 49 Pac. 23, recently decided by the Supreme Court of Colorado. It is further conceded that if the date of the *delivery* of the bonds is to control, then a total indebtedness of sixty-six thousand and odd dollars could be contracted by Lake County within the constitutional inhibition. That the date of the delivery does control is made apparent by the following authorities:

Teidman Neg. Paper, §§ 10, 11 and 34.

Anthony County vs. Jasper, 101 U. S. 693.

Coler vs. Cleburne, 131 U. S. 162.

Town of Weyamorga vs. Ayling, 99 U. S. 112.

Jesler vs. City of Seattle, 25 Pac. 1014.

Louisiana vs. Wood, 102 U. S. 294.

If such be the case, there is nothing on the face of the bonds which brings this case within the rule laid down in *Dixon County vs. Field*. The distinction which exists in that case is so apparent that it is inexplicable how the pretended confusion which seems to exist could have arisen among the members of the bar who have since that time been engaged in litigation touching the municipal indebtedness of the various counties of Colorado.

Section 2 of Article 12 of the constitution of Nebraska is set forth on page 87 of the case of *Dixon County vs. Field*, in 111 U. S. It will be seen on an examination of that provision that the aggregate of indebtedness should not exceed 10 per cent of the assessed valuation of the

county. There was one thing only to be ascertained by the proposed purchaser of Dixon county bonds, viz. the assessed valuation, a thing required by statute to be kept, and not only by statute, but it is especially referred to in the constitution itself. The purchaser of bonds in that case was advised upon the face of them that the total issue was \$87,000. The assessed valuation of the county for that year was \$587,331, and it was held, and rightfully, that inasmuch as a computation could determine the question of the excess of the issue, there could be no such thing as an innocent purchaser of the bonds.

Now, let us examine the section of the Colorado constitution above quoted. It will be observed in the first place that in computing the amount of indebtedness which any county could have under this constitutional inhibition, there were two exceptions applied to this case, viz.: First, all debts which were contracted before the adoption of the constitution should be excluded. Second, the section of the constitution had no applicability to counties having a valuation of less than one million of dollars. While it was true that Lake county was created by the act of February 8, 1879, (see pp. 45, 46, 47 and 48, Sess. Laws Colo. 1879,) and therefore became a county later than the adoption of the constitution, it is equally true, as will be seen by an examination of the provisions creating it, that it was carved out of the old county of Lake, which was in existence from the time of the formation of the territory. Sess. Laws 61, p. 57, sec. 33; section 35 of chapter 20 of the laws of 1868. Lake county was, by the terms of the act and section 4 of Article XIV of the constitution, required to pay its proportion of the existing indebtedness of the old county of Lake prior to the formation of the present

county, and whatever amount there was of such indebtedness would at no time be affected by this constitutional provision. See sec. 8, Sess. Laws Colo. 1879. At some time in the history of Lake county, or the county out of which it was carved, it had a valuation of less than one million of dollars. Whatever indebtedness existed at the time of reaching the one million dollar limit, or before the adoption of the constitution, the foregoing section had no application to. Hence, a purchaser of Lake county bonds, examining the face of the bonds, would see that the proposed issue was \$50,000. He would equally see that it was possible for Lake county to have \$16,000 odd of indebtedness under the constitutional limitation and the assessed valuation over and above the amount of these bonds. He would with equal clearness ascertain that the amount of indebtedness as Lake county had before it reached the one million dollar limit could be added to that \$66,000 odd. He would also rely upon whatever indebtedness it may have had prior to the adoption of the constitution of 1876, being added to that. Now, if that be true, in the light of anything which appears in this record, from an examination of the evidence rejected as well as the evidence admitted, who can say what the legal limit of indebtedness was on the 6th day of September, A. D. 1880? Counsel seem to think that a mere computation of a certain percentage on the assessed valuation of Lake county will determine that question. Palpably this is not so. If that is true counsel fails to point out wherein there is anything in the record which changes the rule that constructive notice can never be broader than actual notice. Admitting that respondent is charged with constructive notice of the amount of the outstanding indebtedness of

Lake county, as claimed by the petitioner, how much of that indebtedness was contracted before the adoption of the constitution? How much of it prior to the time that Lake county reached the one million dollar valuation? Hence any indebtedness which the county had would be presumed to be valid until the contrary be made to appear, which nowhere does appear. The argument of counsel would seem to indicate that the presumption obtains that these bonds are void, and the burden is upon the owner and holder of them to establish their validity beyond a reasonable doubt. Such is not the rule which obtains with this class of paper. Every presumption and intendment is in favor of the validity of the bonds and of the coupons thereto attached, and it is only by specific evidence, the burden of producing which is upon the county, that this presumption can be overcome. How does this county attempt to overcome it? It introduces the county clerk's warrant register. Whoever held that the warrant register provided to be kept by the county clerk is such a book as is required to be noticed by a proposed purchaser of bonds? But even suppose that he was obliged to take notice of it, of what fact could it advise him? Section 44 of the act of March 24, 1877, provides that the county clerk "shall not sign or issue any county order, unless ordered by the board of commissioners authorizing the same; and every such order shall be numbered, and the date, amount, and number of the same, and the name of the person to whom it is issued, shall be entered in a book kept by him in his office for that purpose." A purchaser of bonds examining this book would be advised that on certain days certain warrants were issued by the county. There would be no notice whatever to advise him when the

indebtedness was contracted which was represented by that warrant. It is too well settled to admit of doubt that the date of the contract is what determines the validity or invalidity of a county's debts under this section of the constitution.

People vs. Wilder, 41 Fed. 512.

Lake County vs. Standley, 49 Pac. 23.

So that while it might be true that a proposed purchaser of bonds could have seen, had he examined the so-called county warrant registry, that the issuance of county warrants was taking place from day to day and from month to month, he could not have told from an inspection of that book when the indebtedness was contracted which was represented by the warrant so issued; and he furthermore could not have ascertained from any such book, or from any book introduced or sought to be introduced in this case, the amount of the old warrants which were daily being taken up and canceled under the provisions of the law which are of equal force and effect with the keeping of this warrant register. It is, therefore, a matter which admits of no doubt that the warrant register can in no manner show what the indebtedness of a county is. Its purpose is to show the amounts of warrants issued between given dates. Now, a warrant is issued exactly the same whether there is money in the treasury to pay the warrant or not. If there be money in the treasury against which the warrant is drawn, there could in no wise be any indebtedness represented thereby. If a warrant be but the evidence of a pre-existing debt, then the date of the contraction of that indebtedness would be the matter which would have to be determined

under the constitutional inhibition. By the terms of the act under consideration it becomes the duty of the board of county commissioners of each county to "make out semi-annual statements at the regular sessions in January and July, at which times they shall have such statements published in some weekly newspaper published in the county, if there be such published, and if there be no newspaper published in the county, such commissioners shall cause such statements to be posted in three conspicuous places in said county, one of which shall be the court house door: and such statement shall show the amount of debt owing by their county, in what the debt consists, what payments, if any, have been made upon the same, the rate of interest that such debts are drawing, also a detailed account of the receipts and expenditures of the county for the preceding months, in which shall be shown from what offices and on what account any money has been received and the amounts, and to what individuals and on what account any money has been paid, and the amounts: and shall strike the balance, showing the amount deficit, if any, and the balance in the treasury, if any, and the statement thus made, in addition to being published as before specified, shall also be entered of record by the clerk of the board of county commissioners in a book to be by him kept for that purpose only, which book shall be open to the inspection of the public at all times." Wherein does this record, attempting as it does to charge us with constructive notice, comply with the terms and conditions of this section? For a period of a certain six months, which is thought to cover this transaction, there was some evidence of a publication in a weekly newspaper published at Leadville, but of such an

unsatisfactory character that it could not be received (fol. 266). In the ensuing six months there was a record which in every essential particular failed to comply with the statute, as will be seen by an examination of the record kept by the county clerk and recorder in connection with the statute, but no evidence of any publication whatsoever. If we are to be charged with constructive notice, then it must be the notice called for by the statute under which the bonds are issued. It is too palpable that any and all of the records of Lake county taken together would not enable the most astute person, from an examination of them, to determine what, if any, illegal indebtedness of Lake county existed. While he might be advised that the gross sum was in excess of a certain percentage of the assessed valuation, there was nothing to show of what the indebtedness consisted, or when it was contracted. It is not necessary to pursue this analysis further.

We might elaborate upon the proposition that under the statutes counties are constantly liquidating warrants upon receipt of funds in the county treasury, and boards of commissioners are constantly issuing new warrants. If the new warrants so issued should be for indebtedness contracted at a time after old warrants have been liquidated by payment, assuming that the county was below or at (for it could never be above) the limit of its indebtedness, if the amount so issued were within the amount redeemed, such warrants would be perfectly valid. The void warrants, if any there were issued in excess of such amount, would be void for all purposes, and they could not be used by the county for any purpose whatsoever. It is a strange and anomalous condition of law which, in

some of the minor jurisdictions is too prevalent, that allows all of the warrants of a county, legal or illegal, to be used as a constitutional barrier to the enforcement of the particular indebtedness sued upon, and in turn when other and different obligations are in suit to permit alleged indebtedness, which has long since been declared invalid, to serve a like purpose to defeat such new suit.

We thus pay particular attention to the difference which exists between our constitution and the constitution of Nebraska, for unless counsel can bring this case within the doctrine announced in *Dixon County vs. Field*, they practically concede that they are without standing either in this case or upon this application.

One thing is certain, in the face of constitutional inhibition, bonds are held by this court to be valid, and innocent purchasers of them are protected where the county has received value, even though the amount of such bonds be beyond the limit.

Buchanan vs. Litchfield, 102 U. S. 290.

Pana vs. Bowler, 107 U. S. 539.

Oregon vs. Jennings, 119 U. S. 74.

Chaffee County vs. Potter, 142 U. S. 364.

In *Chaffee County vs. Potter*, *supra*, this court held under this same provision of this same constitution, an issue of bonds which were in excess of the limit entirely valid because of the recitals, and that too without invoking the aid in any way of the exceptions in the constitution above pointed out, which make it impossible for a purchaser to determine the amount of legal or illegal indebtedness of any county within this state.

The point to which we wish especially to direct the at-

tention of the court is, that inasmuch as the constitution provides that a certain limit shall not be exceeded as to indebtedness, and inasmuch as it provides certain exceptions which shall not be counted in ascertaining what that indebtedness is, that it was perfectly competent for the legislature, to provide, as they did by section 30 of the act in question, that a financial statement should be made semi-annually showing *in what the indebtedness consisted*," so that a purchaser of bonds attempted to be issued under that act could determine from this semi-annual statement if his bonds were within the constitutional limit. If then the authority must be lodged somewhere to determine in what the indebtedness of the county consists, the nature and character of it, etc., as is prescribed by section 30 of the act, that power can be properly lodged in a board of county commissioners. If it is lodged there, and if an inspection of the record, either made or implied, will fail to show the one who proposed to deal with the county, that the county has either reached or exceeded its limit of indebtedness, or that any of such indebtedness is within the constitutional inhibition, then under the doctrine of Chaffee County vs. Potter, and similar decisions, the determination reached by the Court of Appeals is just.

Nor is there anything in the Sutliff case, found in 147 U. S. 231, which militates against this doctrine. The stipulated facts upon which it was certified shows that the county was contracting indebtedness greater than that permitted by the limitation contained in the constitution and statute of Colorado. The plaintiff in that case admitted that fact, and that the indebtedness thereby created was in excess of the constitutional limitation, but relied upon the recitals in his bond and the fact that he had no

actual notice of such indebtedness. The Supreme Court, therefore, assumed under that admission that section 30 of the act was fully complied with, and that if the plaintiff in that cause had examined the record, which was assumed to be kept under section 30, he would have ascertained that his bonds were in excess of the constitutional limitation and therefore void.

In the case at bar we call for the record and notice as provided by section 30, and behold it is not in existence. If, then, constructive notice can never be broader than actual notice, and if the plaintiff in that case could have had no actual notice, then he simply stipulated away his right to a recovery, and as the Court of Appeals well say, the very thing which "was assumed and not questioned in the Sutliff case" is clearly shown not to exist in this case, covering any of the time which could affect the legality of these bonds. Nor does the awful consequence ensue, which is predicted by counsel, viz that the Supreme Court have declared that \$5,000 of the issue of bonds created by the same vote to be void, while the Court of Appeals in this decision declare \$50,000 to be valid. The Supreme Court decided the case which was before it, as made by the parties to the case. On other and different coupons, under evidence which would be the same as in the case at bar, it requires no prophet to foretell that the Supreme Court, when again called upon, will not hesitate to assert the validity of the bonds, which counsel in the former case virtually stipulated out of court.

The distinction which ought to be fixed in mind between the doctrine relied upon by counsel in *Buchanan vs. Litchfield*, 102 U. S. 290, and similar cases, and the one at bar is this. In those cases a purchaser of bonds was

held to know that there *must be such a thing as an assessed valuation*; but no case has held that anyone must be presumed to know that there is a debt or that he must *presume* that debt invalid if there be one. If the books do not reveal that such assessed valuation had been made, then the purchaser of bonds must take his chances upon the fact that an assessment, when made, would show either the one thing or the other as affecting the validity of the bonds which is proposed to be purchased. It is not necessary that a county shall have a debt. It is necessary that it shall have an assessed valuation. The presumption which obtains in the one case is not applicable in the other, and unless the record called for by the section enacted in connection with the issuance of these bonds, which gives to the county commissioners the power, and places upon them the duty, of making out these statements, is complied with, a purchaser of bonds has a right to rely upon the recital "that all of the provisions of said act have been fully complied with by the proper officers in the issuance of this bond." *One of the provisions of this act (Sec. 21) reiterates in express terms the limit provided for by the constitution.* If the argument be carried to its logical conclusion, then the constitutional inhibition relating to indebtedness is so sacred that no escape can occur under it, no matter what the recitals of the bond may be. If that were true, there might be an end to the contention in this case, but as we have already seen in the face of this express constitutional inhibition the Chaffee County bonds were held to be valid, and in scores of similiar cases the same result has been obtained. Hence, we need not follow that portion of counsel's argument which is addressed to the consideration of these questions. Nor is the true distinction drawn,

by counsel, in our opinion, in such a case as *Hedges vs. Dixon County*, 150 U. S. 182. Under that constitutional provision the bonds were sought to be issued in express and open violation of it. Here the power to issue the bonds exists, and the amount is expressly authorized by a vote of the people. The amount is to be ascertained within which such bonds may be lawfully issued by the board of County Commissioners of the various counties issuing them. There the Board of County Commissioners had nothing to do with the matter in any way, shape or form. The constitution fixed the limit. There were no exceptions, and everyone could ascertain for himself just as well as the Board of County Commissioners could ascertain for itself the lawful amount.

This brings us to a consideration of the only remaining matter, and that is, whether or not the bonds sought to be issued by Lake county should have been issued in at least two separate years.

It will be observed that Judge Thayer did not dissent from any other proposition decided by the Court of Appeals. Hence, much of the argument which is addressed to the consideration of the *bona fide* purchaser or of the right of plaintiff to maintain the suit, or of the true judicial value of the publication and the warrant register sought to be introduced in evidence, lose much of their force; but Judge Thayer did dissent upon the single proposition of the amount of the indebtedness which could be incurred under this bond issue in any one year. We do not believe that we can add anything to the very lucid and able exposition of Judge Lochren, concurred in by Judge Sanborn; but it seems to us that neither the case of *Lake Co. vs. Rollins*, 130 U. S. 662, or *People vs. May*,

9 Colo. 80, warrants the inference drawn therefrom by Judge Thayer. In the Rollins case, as well as the May case, the single and only question before the court was whether or not the constitutional inhibition governed as applied to the aggregate amount, or the amount which could be contracted by loan only, and not whether or not the aggregate amount of indebtedness which could be had without a vote and the aggregate amount which could be had with a vote were both governed by the clause relating to the amount which could be contracted in any one year. The constitution was enacted as a limitation upon the servants of the people. It was thought by the form of that enactment, from the language they used, that when those servants were engaged in running in debt it would be well to place a limit upon the amount which they could contract, and it would be quite as wise to divide this amount by two and prescribe that the quotient only could be contracted in any one year. In the language of Mr. Justice Lamar, after having done this, they then passed to a broader subject, and after discussing the *modus operandi* to be pursued in the creation of a greater indebtedness, they fix the aggregate limit of debt which could be created by vote to double the aggregate amount which had theretofore been provided for without a vote. In other words, the constitution recognized that emergencies might arise when it would not be safe for the representatives of the people to create indebtedness without the distinct sanction of the people themselves. Now, when this direct sanction is obtained, as in this case, wherein is the logic or the sense of saying that the people themselves, who made the constitution, should be limited as to the amount which they should contract in any one

year, by holding the first provision of the section to be a limitation upon the last portion. The language of the latter portion refers only to the *rate* upon the valuation last above mentioned, it does not refer to the *time* last above mentioned, and we contend that had it been the intention of the framers of that section to limit the question of *time*, as well as the question of *rate*, they would have said so in the one case as they did in the other. Owing to the fact that they did not say so, and owing to the further fact that such a construction would compel the absurd conclusion either that an issue of bonds must be made one-half on the last day of one year and one-half on the first day of the year following, as is ludicrously suggested by counsel in their brief, or that a total of the indebtedness sought to be contracted in a given period could only be contracted in installments, as is suggested by Judge Thayer in his dissenting opinion, we are constrained to believe that the broad, common sense view which has been taken by Judge Lochren if again passed upon by this court will be upheld.

We have thus far assumed, in accordance with the probable position of Judge Thayer in his dissenting opinion, that these bonds represented a debt *by loan*. While the orders of the board speak of contracting a debt by loan, it will be clearly seen from the manner in which the bonds were actually disposed of that no debt *by loan* was ever contracted. The larger part of the bonds were paid directly to the contractor who built the court house and the balance, after they had been issued, were sold for cash. The distinction between the contraction of a debt by loan and the issuance of bonds to pay or secure the same, and the sale of bonds on the market after they have

been issued, is broad and clear. In the one case money is borrowed and the bond is issued to pay or secure it; in the other the bond is issued in advance and sold as a piece of chattel property for what it will bring.

City of Brenham vs. German Am. Bank, 144
U. S. 173.

Merrill vs. Monticello, 138 U. S. 673.

Ashuelot National Bank vs. School Dist. 56
Fed. 197.

Simonton Municipal Bonds, §§ 142-4.

In concluding this brief we desire to say that lack of time has compelled an exceedingly hasty preparation of it. We do not consent to any of the statements contained either in the petition for the writ or the brief in support thereof emanating from counsel on the other side, save and except insofar as the same are sustained by the record proper. Under the ingenious presentation of counsel many of the facts appearing in the record are entirely suppressed, and others can only be viewed in the proper light by taking them in connection with the facts accompanying their presentation. But of these matters we have treated fully in our briefs which were filed in the court below, a few copies of which, we ask leave to file herewith and have considered in connection with the remarks here made.

Respectfully submitted.

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